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No. 83-1381

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

WALTER FEINSTEIN, JACK KRIEGSMAN,
LEO MILLER, MORTON H. PASTOR and
JASON I. GREEN,
Petitioners,

vs.

NETTLESHIP CO. OF LOS ANGELES,
PACIFIC INDEMNITY COMPANY,
INSURANCE COMPANY OF NORTH AMERICA,
HARDWARE MUTUAL CASUALTY COMPANY,
AMERICAN RE-INSURANCE COMPANY, and
NORTH AMERICAN RE-INSURANCE CORPORATION,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I

PRELIMINARY STATEMENT

The brief in opposition presented by respondents fails to address the single question of law[1] which petitioners request be accepted for review. Respondents make no credible effort[2] to reconcile the clear conflict between the decisions of the courts below and this Court's opinion in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978). Nor do respondents offer any comment upon the conflict between the holdings of the courts below that unlawful monopolization is, as a matter of law, "barred by the *McCarran-Ferguson Act*" (*Appendix E*, p. 45) and "not within any exception to the *McCarran-Ferguson Act*" (*Appendix A*, p. 12) and the contrary view espoused by the Third Circuit[3]. Nor do respondents urge that the

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[1]The legal question is:

> Whether the willful creation and maintenance of an admittedly unlawful insurance monopoly which excludes competition and which substantially damages consumers of insurance is exempt from prosecution under the federal antitrust laws by the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013.

[2]While respondents make passing reference to this Court's opinion in *St. Paul v. Barry* (*Brief in Opposition*, p. 12), respondents entirely ignore this Court's teaching that prohibitory state legislation does not act to shield private monopolies from the federal antitrust laws:

> It is not disputed that Congress intended that certain forms of "regulation by private combinations and groups," 91 Cong. Rec. 1483 (1945) (remarks of Sen. O'Mahoney) *remain* subject to Sherman Act scrutiny, *notwithstanding* enactment of the type of "prohibitory legislation," coupled with "enforcement through a scheme of administration," that was deemed sufficient for § 2(b) purposes in *National Casualty Co. Id.* 551, fn. 24.

[3]*Travelers Insurance Corp. v. Blue Cross of Western Pennsylvania*, 306 F.Supp. 219, (1969); 351 F.Supp. 774 (1972) *aff'd Travelers Insurance Co. v. Blue Cross of Western Pennsylvania*, 481 F.2d 80, 85 (3d Cir. 1973); *cert. den.* 414 U.S. 1093 (1973).

opinions of the courts below—extending *carte blanche* to those who would unlawfully combine or act to monopolize insurance markets—fail to present an important question of federal law or to otherwise fully satisfy the special criteria normally employed by this Court in determining whether to allow issuance of its writ for review on certiorari.

Rather, respondents state that their opposition to issuance of this Court's writ is made on the ground that "the decision below turns upon an *analysis of the particular facts* which were proffered to the trial court" (*Brief in Opposition*, p. 7, emphasis added). The stated basis of respondents' opposition is frivolous, and is directly contravened by the position consistently taken by respondents throughout the fifteen year course of proceedings in the courts below. Accordingly, petitioners submit the following brief reply in order to address the procedural arguments—raised by respondents for the first time in their opposition—and in order to further demonstrate that the question presented to this Court is one of law, and is fully deserving of review on certiorari.

II

THE PROCEDURAL FACTS

A. The Allegations of Unlawful Monopolization

Contrary to the statements made by respondents, the complaint alleges an unlawful combination to monopolize and unlawful monopolization[4] as follows:

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[4] During the period of defendants' unlawful monopoly, medical malpractice insurance was not available in Los Angeles County on a democratic (or republican) basis. There was no "election" involved. Neither did petitioners obtain insurance through a program which they "sponsored" as members of a medical association. To the contrary, all competition having been excluded by defendants, petitioners bought their policies at the point of an economic gun (Petition, p. 12; *Pastor Dep.*, pp. 20-22; *Kriegsman Dep.*, pp. 21-25; *Feinstein Dep.*, p. 120).

14. . . . [D]efendants and others acting in concert with them have violated and are now violating Sections 1 and 2 of the Sherman Act by unlawfully contracting, combining and conspiring to monopolize, monopolizing and attempting to monopolize and by unlawfully contracting, combining and conspiring to restrain trade and commerce in medical malpractice insurance in California. Additionally, each defendant has attempted to monopolize said trade and commerce, and defendants, individually and collectively, have monopolized said trade and commerce, all in violation of Section 2 of the Sherman Act.

15. The said unlawful monopoly, conspiracy to monopolize and to restrain trade in medical malpractice insurance in California have consisted and do consist of a continuing agreement and concert of action among the defendants, and each of them, to maintain substantial control of the market for medical malpractice insurance for medical doctors in Los Angeles County, and to eliminate competition therein so as to preclude said medical doctors from obtaining medical malpractice insurance from any other source; and to fix at an exorbitantly high premium rate so as to extract exorbitant profits (*Appendix N*, pp. 116-117).

These allegations constitute a short and plain statement of the monopolization claim, and adequately state a cause of action[5] for unlawful monopolization, *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746, 747 (1976). As previously noted, these were the allegations

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[5]The complaint alleges that respondents' unlawful monopoly damaged petitioners in that petitioners were:

> denied the benefits of free and unrestricted competition in the sale of medical malpractice insurance and were compelled to pay substantially higher prices for medical malpractice insurance than would have been the case but for the violation of the antitrust laws" (*Appendix N*, p. 119).

taken as true by the District Court for purposes of its ruling on the monopoly/exemption issue. (Pet. p. 14).

B. The Positions of Law Taken by the Parties in the Courts Below

The position of respondents in the courts below at all times was that Section 2(b) of the *McCarran-Ferguson Act*, 15 U.S.C. § 1012(b), operates to entirely exempt an admittedly unlawful monopolization of an insurance market from prosecution under the federal antitrust laws. More precisely, respondents have continuously contended that, as a legal proposition, an unlawful monopoly does not constitute an act of boycott, coercion or intimidation within the meaning of 15 U.S.C. § 1013(b), and have likewise contended that an unlawful combination to monopolize did not, as a matter of law, constitute an agreement to boycott, coerce or intimidate within the meaning of 15 U.S.C. § 1013(b). Respondents' contention has continuously been that, assuming the existence of an unlawful monopoly or combination to monopolize causing injury to petitioners' business or property, *something more was needed*. Specifically, respondents' contention was that, as a matter of law, petitioners were required to show some act or agreement of boycott, coercion or intimidation *other than* unlawful monopolization in order to avoid dismissal of their monopoly claims as barred by 15 U.S.C. § 1012(b).

In recognition of the plain fact that petitioners, had in opposition to defense motions for summary judgment, presented the District Court with a Rule 56(c) record which not only suggested a genuine issue of material fact as to the existence* of an unlawful combination to monopolize and actual monopolization, but which conclusively estab-

*Appendix A-I hereto is an excerpt from Appellant's Reply Brief, filed with the Circuit Court on May 2, 1963, which sets out certain of the evidence pertinent to respondents' maintenance of an unlawful monopoly.

lished an unlawful monopoly and its effects upon petitioners, respondents made certain concessions and stipulations in order to "focus" the District Court's attention upon the *legal* position which they urged be accepted. Thus, the following colloquy occurred between counsel for respondents and the District Court in connection with the defense motion for summary judgment:

> [Counsel for Pacific Indemnity] I would like very, very much to try to get this argument in focus, and I would like to suggest to the court, therefore, that *it may be assumed,* for the purpose of this argument, for the purpose of the motion made on behalf of Pacific Indemnity Company, that the plaintiff could make out *a perfectly good case of monopolization* or attempt to monopolize or a conspiracy or combination to restrain trade, and under the McCarran-Ferguson exemption, it would avail plaintiff nothing, unless there were sufficient evidence in the case to create a triable issue of fact, as to whether or not any of those alleged antitrust violations, monopolization, attempt to monopolize, conspiracy, combination to restrain trade, were effectuated by an agreement or act of boycott, coercion or intimidation.
>
> I think it would be probably absurd of us to come in here and ask the court to decide whether there was a combination or conspiracy and restraint of trade or monopolization or attempt to monopolize on a motion for summary judgment. (*Hearing,* 11/5/81; *TR.,* pp. 14-15).

Contrary to the legal position taken by respondents, petitioners have—continuously since 1969—taken the position that, irrespective of any state law purporting to either permit or proscribe insurance monopolies, the unlawful monopolization of interstate trade and commerce in an insurance market is not—by reference to the *McCarran-Ferguson Act* or otherwise—exempt or protected

from prosecution under the antitrust laws of the United States. The position of law taken by petitioners was that an unlawful combination to monopolize in fact constitutes an agreement to boycott, coerce and intimidate within the plain meaning of 15 U.S.C. § 1013(b), and was that unlawful monopolization constituted an act of boycott and economic coercion and intimidation in the highest and best sense of the statutory provision. Petitioners accepted the concessions and stipulations offered by defendants in connection with the motions for summary judgment, and argued the legal point to the District Court at length;

> [Counsel for Petitioners] Plaintiffs now have and have always had a single interpretation of the McCarran Act, what activities are exempt by reason of the McCarran Act, and it hasn't been agreed with by defendants, and at one point wasn't agreed with by Judge Kelleher.
>
> Your honor, in St. Paul [*Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978)]—and this is at pages 547, 548 of the United States Report—the Supreme Court was dealing with, among other things, the question of who, what class of persons might maintain a private civil action where it was shown or admitted, for purposes of the pleadings, that conduct which amounted to boycott, coercion or intimidation in fact occurred.
>
> In dealing with that question, the Supreme Court was required to address and did address the general scope of the McCarran Act, and the Supreme Court did so in both the majority opinion and in the dissent. Both the majority opinion and the dissent were in agreement, basically, as to the general scope of the McCarran Act, the scope of the exemption; they were in disagreement as to who could invoke the 3(b) exception. That is where they disagreed.

Justices Rehnquist and Stewart said it had to be persons in that insurance industry, and the majority, of course, held that that wasn't so. But the majority opinion on the question of rates that counsel mentioned and on the question of monopoly that counsel have mentioned, and which has been briefed to the court, the majority opinion states:

"The congressional debates make clear that the boycott exception was viewed by the Act proponents as an important safeguard against the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies."

And that is at page 547.

On the question of monopolies, then, your honor, the clear reading of the majority opinion in St. Paul was that, even if a state were to, by legislation, act to authorize or permit a monopoly, that activity by the state would not be sufficient to render that monopoly exempt or immunized from the federal antitrust laws. That is what they construed 3(b) to mean in part.

Now, on this point of monopoly and price fixing, the dissent also has something to say, and it is in agreement with the majority on this point.

This, your honor, is at page 550 of the St. Paul opinion.

Justice Rehnquist, I believe—I am not certain whether he wrote it or not. Rehnquist and Stewart state:

"Repeatedly, Congressmen involved in the drafting of the statute drew a distinction between state regulation and private regulation. Congress plainly wanted to allow the states to authorize anticompetitive practices when determined to be in the public interest as indicated by formal state approval."

Then they footnote the congressional debates.

"Congress just as plainly wanted to make sure that private organizations set up to govern the industry would not escape the reach of the federal antitrust laws. Section 2(B)—"

NOT 3(B)—the boycott, coercion and exemption Section *2(B)*.

"Section 2(B) also meets this concern to the extent that states do not authorize or sanction or approve of anticompetitive practices promoted by such organizations."

That is at page 565.

And Counsel himself read the footnote from Barry, which indicates that it is state sanctioned—that is to say, state approved, price fixing that falls within the exemption provided by 2(B). That has always been the position of plaintiffs in this action, from day one.

• • •

The Court ought to deal with those questions: Is it true that monopoly, admitted monopoly, is exempt from the federal antitrust laws by the McCarran Act? Is that true, as a legal proposition?

Is it true that agreements to fix prices which are prohibited by the state law, which are not approved by the Insurance Commissioner, are exempt from federal prosecution by reason of the McCarran-Ferguson?

The answer to those questions is absolutely no. Any fair reading—any reading, really, any reading of the Congressional Record—and we have given the Court the excerpts and the case law—suggest that the answer is no. It is a flat no. [*Hearing*, 11/5/81, *TR.* pp. 55-58, 63][1]

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[1]Respondents clearly recognized and commented upon the position of law taken by petitioners in opposition to the motions for summary judgment:

Respondents flatly conceded that petitioners could make out a "perfectly good case of monopolization." They expressly invited the District Court to assume that unlawful monopolization had been fully established. As demonstrated in the petition, the District Court accepted respondents' invitation, eschewed reference to the Rule 56(c) record facts evidencing the monopolization claims, and erroneously accepted respondents' legal argument that unlawful monopolization was "barred by the *McCarran-Ferguson Act*." [Pet. pp. 12-15]. Thus, respondents' assertion that "the decision below turns upon an analysis of the particular facts which were proffered to the trial court" does not stand scrutiny, and provides no proper basis for opposing issuance of this Court's writ.[8]

[Counsel for Pacific Indemnity]

> The arguments we have heard today that monopolization in any event is not within the McCarran Act exemption, which I believe is unsupported by any case or any academic discussion [*Hearing, TR.* p.83].

[Counsel for Sentry]

> Counsel concludes by saying that he wants a ruling that monopoly and unapproved price fixing are exempt or not exempt under the law. It is clear this is the plaintiff's main point [*Hearing*, 11/05/81, *TR.* p. 87].

[8]Like the District Court, the Court of Appeals below treated the question of *McCarran-Ferguson Act* exemption as a question of law and held:

> Thus even if plaintiffs could establish a violation of Section 2 of the Sherman Act in this case, *some additional* act or agreement constituting boycott coercion or intimidation *would have to be shown* [*Appendix* A, p. 12, emphasis added].
>
> and
>
> Monopoly alone is therefore not within any exception to the McCarran Ferguson Act [*Appendix* A, p. 12]

III

CONCLUSION

The opinions of the courts below decide a question of federal law in a way which substantially conflicts with this Court's decision in *St. Paul v. Barry, supra*, and with the law as followed by the Third Circuit. The question of whether an unlawful insurance monopoly is exempt from prosecution under the federal antitrust laws is one which has a substantial impact nationally in both the insurance and health care sectors of the economy. Petitioners most respectfully submit that the question presented is one which the Court should, in the exercise of its sound discretion, accept for review. Accordingly, petitioners ask that the Court permit issuance of its writ.

Dated: April 30, 1984

Respectfully submitted,

ALIOTO & ALIOTO
JOSEPH M. ALIOTO
LAWRENCE JOHN APPEL

By LAWRENCE JOHN APPEL
One of the Attorneys for Petitioners

(Appendix A-1 follows)

Appendix A-1

E. Maintenance of Monopoly Power

The record before the district court was that, by August, 1966, the Nettleship pool had "little or no competition." At the same time, the pool learned that *members* of the medical associations were attempting to "establish their own insurance company." (*Further Submission*, 1/13/81, pp. 103-104). As seen, the Nettleship pool's market position was obtained through concerted refusals to deal resulting from private agreements between Nettleship and various medical associations,[1] which agreements in turn were aimed toward the elimination of a "multitude of brokers" from the Southern California medical malpractice insurance market. (*Further Submission*, 1/13/81, p. 12). Although the facts and testimony specified in plaintiffs' January 13, 1981 *Further Submission* ought to be fully considered on these points, the record submitted to the district court concerning the course of conduct undertaken by defendants at a time when they had little or no competition in the Southern California medical malpractice insurance market may be briefly summarized in the following fashion.

In December, 1966, subsequent to its acquisition by INA, Pacific Employers Insurance Company withdrew from the Southern California medical malpractice insurance market, leaving Nettleship as the sole broker "approved" by any of the original eleven Southern California county medical associations. All of the Pacific Employers insureds were immediately referred to Nettleship for malpractice insurance, and, in July, 1967, the Nettleship pool expanded its

---

[1] It must be stressed that these agreements were employed to both force membership and to require that physicians remain members of the county, state, and national medical associations. (*Further Submission*, 1/13/81, pp. 121, 122, 164, 165).

operations into San Diego. (*Further Submission*, 1/13/81, pp. 108, 109, 122-124).

In September, 1967, the Nettleship Pool met and determined that "competition in this market has lessened to such an extent that the rate increase proposal of the INA for next year was accepted without question by the Nettleship Company." (*Further Submission*, 1/13/81, p. 127).[28] In the meantime, the medical association officers put Nettleship's agreement to boycott to its intended use as an economic club. Thus, in 1967, an individual physician wrote to Nettleship and complained:

> Reference is also made to our privilege [sic] communication relative to the current concept that it is impossible for local physicians to obtain liability insurance without being an active member in the Medical Society.
>
> At the moment a major factor in our not causing a real breach within the [medical] society is the fact that the *society holds over our head* the fact that we would be *unable to obtain liability insurance without being an active member in the society.*
>
> There are approximately 20 of us involved in the current "conflict" [with the County Medical Society]. I would be most interested to learn if it would be possible for an individual like myself for example to obtain liability insurance as a person *without membership* in the local Medical Society. I would also like to know if it would be possible for a *group* of us to get together as a separate unit and apply for liability insurance through your company. (*Further Submission*, 1/13/81, p. 131).

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[28] At the same time defendant Sentry was advised that "only approximately $5 million was actually paid out in losses [on the Nettleship business] against a written volume of $19,000,000." (*Further Submission*, 1/13/81, pp. 130, 131).

In January, 1968, Pacific Indemnity and INA increased their percentage participations in the Nettleship pool, and Nettleship offered to pay LACMA $6,000.00 per year "so long as [Nettleship remained] the sole approved professional liability broker." (*Further Submission*, 1/13/81, pp. 140, 147, 148). Thereafter, on August 15, 1978, LACMA attempted to obtain the renewal dates on Pacific Indemnity policies from Nettleship so that other malpractice markets might be investigated. Eleven days later, Nettleship attended a meeting of the pool and, after a rate increase of 75% had been agreed to, advised those present that "he can *control* the . . . medical associations." (*Further Submission*, 1/13/81, pp. 151-152, 156). Accordingly, on September 4, 1968, Nettleship wrote to LACMA and flatly refused to provide the requested policy renewal dates because they "would only be valuable to another carrier who might decide to compete with the program." (*Further Submission*, 1/13/81, pp. 157, 158).[23] On March 24, 1969, the members of the Nettleship pool met in New York, and Nettleship advised those present that "our program probably has a 98-99% market penetration." Referring to its refusal to provide policy renewal dates, Nettleship advised further that "abortive attempts to start new malpractice companies

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[23] At the same time, and in answer to requests by individual physicians that LACMA attempt to itself break up the Nettleship pool's monopoly, Nettleship reminded LACMA of the benefits it was conferring on LACMA by its continued boycotting activity, and in a letter to LACMA's president stated: "We [Nettleship] had to threaten to terminate Dr. Allred's insurance because he failed to file a [membership] application. It appears that he *only joined the Association to avoid cancellation* of his professional liability insurance." (*Further Submission*, 1/13/81, p. 165). After the instant suit was filed, Nettleship would admit that there were "many fine doctors who maintained [medical association] membership *only* in order to obtain our insurance." (*Further Submission*, 1/13/81, p. 272).

have to date been unsuccessful." (*Further Submission*, 1/13/81, p. 180).

In May and June, 1969, Nettleship, INA, and Pacific Indemnity obtained confidential information respecting the formation of a competitive malpractice insurance company to be called "Professional Alliance Insurance Company." (*Further Submission*, 1/13/81, pp. 183, 184, 185, 186-188). Thereafter, on June 19, 1983, Nettleship wrote to the LACMA medical review committee respecting its possible endorsementof Professional Alliance, and brazenly and unlawfully threatened to cancel the insurance policies of any physicians who became stockholders in or directors of the Professional Alliance Insurance Company. Even more significantly, Nettleship threatened to drop the association membership requirement if LACMA approved a competing carrier. (*Further Submission*, 1/13/81, pp. 191-192; *Affidavit of Lawrence John Appel*, ¶ 3[d], filed 2/25/74; Dkt. 1691, ¶ 41; Dkt. 1774, ¶ 41).

In August, 1969, the Nettleship pool met again and agreed to a rate increase of 75% "to follow on the heels of last year's [1968] 100% increase." (*Further Submission*, 1/13/81, p. 205). Thereafter, in September, 1969, Allen reported to the pool that he had met with representatives of the twelve county medical associations and reported an "air of resignation on their parts" respecting the 1969 rate increase. (*Further Submission*, 1/13/81, p. 215). For his own part, Allen reported that:

> When we [the pool] proposed our rate increase *he* [Allen] initially became very shocked, and since that time has *simmered down to the reality* that the doctors have *no where else to go*. (*Further Submission*, 1/13/81, p. 218).

Faced with the threat of further, arbitrary, exactions by the Nettleship monopoly, and advised that the hands of the

California Insurance Commissioner were tied,[24] plaintiffs filed the instant action in November, 1969, and after Nettleship had advised that "we have a gun to your head and there is nothing you can do about it" (*Feinstein Dep.*, p. 139), Nettleship responded by filing a spurious $10 million counterclaim in the hope of producing a "Mexican standoff." (*Brief for Appellants*, p. 4, fn. 5).

III

THE PARTIAL EXEMPTION PROVIDED BY THE McCARRAN-FERGUSON ACT HAS NO APPLICATION TO THE ALLEGATIONS OR CONDUCT IN ISSUE

The *McCarran-Feguson Act* was not designed to confer any right or privilege on insurance companies. Rather, its basic purpose was to allay doubts thought to have been raised by the decision of the Court in *United States v. Southeastern Underwriters* • • •

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[24]In May, 1969, plaintiff Feinstein wrote to the California Insurance Commissioner and complained about medical malpractice insurance rates and policy forms. On June 11, 1969, the California Insurance Commissioner responded and formally advised:

> We regret to advise that there is *no* general requirement that insurance policies be approved by this Department prior to issuance. . . .
>
> No liability insurance policies are required to be filed with us. If one were so filed, *we would not have the statutory authority to either approve or disapprove it.*
>
> Whether or not the Los Angeles County Medical Association is to be condemned for their efforts in obtaining the coverage to which you refer *is not a question on which we would care to comment.* (*Feinstein Dep.*, Ex.-1).